

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PHILLIP GUTIERREZ,

Plaintiff,

vs.

No. CIV 2:97-507 LCS/DJS

UNITED STATES OF AMERICA,
et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Defendant United States of America's (USA) Motion to Deny Plaintiff's Claim Insofar as it Exceeds \$40,000, filed December 17, 1997. The USA contends that "the Federal Tort Claims Act, which restricts damages requested in a court action to the amount specified in the administrative claim unless there is either "newly discovered evidence not reasonably discoverable at the time the claim was presented to the federal agency or upon allegation and proof of intervening facts, relating to the amount of the claim" (28 U.S.C. §2675(b)), bar[s] the plaintiff's claim for damages in excess of his administrative claim based on his allegation that he did not know the full extent of his pain and suffering when he filed his administrative claim[.]" Brief in Support of Motion to Dismiss Plaintiff's Claim Insofar as it Exceeds \$40,000 at 1-2, filed Dec. 17, 1997. The Plaintiff responded by stating that there has been insufficient discovery to determine if the requested increase in the amount of the claim is justified. The Plaintiff also asserts that the time to make the §2675(b) determination is at trial. Consequently, the Plaintiff argues that the USA's motion is premature.

I agree with the Plaintiff. Because the issue of whether the Plaintiff's allegation of pain and suffering is sufficient to warrant an increase in the claim amount is fact-sensitive, the best course is to make a final determination via a motion for summary judgment or at trial. **See Martinez v. United States**, 780 F.2d 525, 530 (5th Cir. 1986) (plaintiff is free to present proof of exceeding damages at trial). Therefore, I find that the USA's motion should be denied at this time as being premature.

WHEREFORE,

IT IS ORDERED that the USA's Motion to Deny Plaintiff's Claim Insofar as it Exceeds \$40,000 is denied at this time.

A handwritten signature in black ink, appearing to read 'Leslie C. Smith', is written over a horizontal line.

Leslie C. Smith
UNITED STATES MAGISTRATE JUDGE